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IN FOCUS

Getting the U.S. to Cough Up Data: Who Does It?

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Last May the FBI quietly ordered 198 of its special agents, the ones who are also lawyers, to drop whatever they were doing in the field and return to Washington to work in a top priority matter the agency called "Project Onslaught."

That was not enough manpower, so a month later the bureau ordered an additional 84 lawyer-agents to report to headquarters. Some agents were heard to mutter that Onslaught should really have been called Mission Impossible, but actually it was not all that exciting.

Onslaught is the official name for how the FBI tackled into a mountain of requests for agency files under the Freedom of Information Act and it almost reduced the bureau's backlog to conform to the law, which requires that an agency respond to a request within 10 days.

According to a bureau spokesman, Onslaught cut the agency's response time from 14 months to a little over one month. By the end of September, when the agents went back to the field, Onslaught had cost the government \$2.8 million, which came out of the FBI's regular operating budget.

On the one hand, Onslaught is an indication that Attorney General Griffin B. Bell is trying to bring the Justice Department into conformance with the 1966 law. It appears to

be a major effort by an agency that has long regarded FOIA as a kind of hairshirt for bureaucrats, an item to be avoided as long as humanly possible.

ON THE OTHER HAND, Onslaught is also some indication of the as yet uncalculated but undoubtedly stiff price the federal government must be prepared to pay if it is to live up to the spirit of the law, which was intended to reverse Washington's long-standing practice of limiting public access to public records.

Last week, after determined FOIA

requesters won a federal court ruling that the notes made of Henry Kissinger's telephone calls were public property and forced the release of a quarter-ton of documents in the John F. Kennedy assassination case, the average newspaper reader might be tempted to assume that the administrative wheels and pulleys of FOIA are working well and that the chief beneficiaries of their operations are journalists.

Both of these assumptions would be wrong, very wrong.

Although there are no reliable government-wide figures on the use

of FOIA, there is considerable evidence that the average requestor is a businessman trying to spy on another businessman or trying to peek into the files of a regulatory agency that might be about to regulate him.

According to Mark Lynch, an ACLU attorney regarded as one of the city's foremost experts on FOIA, "it is clear that the media is a very small user; probably 80 percent of all requests are from commercial users."

Even when it might be in the media's interest to use FOIA, according to Lynch, most editors and reporters tend not to.

"I don't know why that is," adds the attorney. "Maybe it's the 10-day

rule. Even among the major papers, only Dow Jones (the publisher of the Wall Street Journal) seems to have the staying power to go into court to enforce their FOIA rights."

Consider the situation at the Food and Drug Administration, which is now receiving FOIA requests at the rate of 24,440 a year. According to Sherwin Gardner, the agency's deputy commissioner, only 5 percent of the requests are from the press or public interest groups. Eight percent are from individuals and 80 percent are from drug companies. The companies, Gardner recently told a Senate Judiciary subcommittee, are frequently trying to get a peek at so-

called trade secrets used by a competitor.

Legitimate trade secrets are exempt from disclosure through the act, but trying to determine which material contains trade secrets has turned the FDA into a kind of administrative battleground, forcing the agency to remove scientists from their normal work of scrutinizing new drugs to examine and pass on FOIA requests. The workload, Gardner insists, is "quite excessive and seriously detracts from the work of the agency."

FOIA HAS BECOME a sizable cottage industry for lawyers who bill clients as much as \$200 an hour for FOIA work. The lawyers have also come up with something new called a "reverse FOIA lawsuit" under which a company whose "secrets" might be exposed by an FOIA request goes into court for an injunction to stop the agency from acting on it.

Used by a clever corporation lawyer, the reverse FOIA suit can be a formidable legal roadblock to stop or at least slow down federal regulators and investigators.

According to Gerald P. Norton, deputy general counsel of the Federal Trade Commission, companies have begun to sue the FTC to protect documents the agency has not yet requested from them. "We get involved in multiple litigation in different courts. It has been a tremendous problem in the last couple of years."

Peter Flaherty, the outgoing deputy attorney general, recently testified that a "nationwide tax and fraud investigation" was held up for over two months after attorneys for potential defendants filed "dozens" of FOIA requests combined with reverse FOIA lawsuits.

According to Flaherty, since the investigators were the only persons familiar with the files, they were pulled off the case to focus on the FOIA matters. The legal tangle absorbed the efforts of 35 special Internal Revenue Service agents and 8 Justice Department attorneys. Meanwhile, Flaherty said, the case was "substantially suspended."

Because of a long history of problems with FOIA, public interest attorneys tend to view statements about how the act interferes with normal agency work with some skepticism.

The Justice Department, for example, is still among the toughest agencies to deal with when it comes to the FOIA. According to a recent study by the Library of Commerce, the highest rate of FOIA denials come from three agencies, the Departments of Defense, Treasury and Justice, in that order.

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